

LAWYERS AND JUDGES AS FRAMERS OF INDIANA'S 1851 CONSTITUTION*

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The present Constitution of the State of Indiana is the product of the Constitutional Convention of 1850-51. Although modified by various amendments, the original document remains the basis for the present organization and structure of Indiana's government and legal system. Its limits on government powers and its guarantees of liberty and individual rights provide basic protections for Indiana citizens today. Yet all of this rests on the ideas and actions of convention delegates 145 years ago. More than one-third of the 154 delegates who served at the convention were trained in the law. Which of the proposals they offered or supported found their way into the 1851 Constitution? Did they seem to focus on certain types of issues? Did they play a particularly significant part in the organization and operation of the convention? Did any of the delegates to the convention go on to serve as judges, and if so, did they author any state constitutional law opinions that reflect insight they gained as members of the convention? The answers to such questions can be surprising.

The convention that drafted the 1851 Constitution assembled in the House chambers of the old Capitol building in Indianapolis on October 7, 1850.¹ Among the delegates were fifty-six men who were attorneys, had studied law, or were, or would become, judges.² Three of the men who later worked as judges

*. This Paper is essentially a transcription of remarks delivered at the Symposium entitled *The History of Indiana Courts: People, Legacy and Defining Moments*, held at the Indiana University School of Law—Indianapolis, on March 1, 1996. Much of the information in this speech was generally gleaned from the records of the convention. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850) (2 volumes); 1851 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (Indianapolis, A.H. Brown 1851). However, due to the fact that this Paper was originally given as a speech, there will not be particular footnotes for each individual fact which was obtained from the convention records.

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1. The convention was held in the House chambers until December 26, 1850, when it was moved to the Masonic Hall in Indianapolis. The delegates continued to meet at this location, at a cost of twelve dollars a day in rent, until the convention's conclusion on February 10, 1851. William W. Thornton, *The Constitutional Convention of 1850*, 1902 REPORT OF THE SIXTH ANNUAL MEETING OF THE STATE BAR ASSOCIATION OF INDIANA 180.

2. This topic presents the difficulty of determining which delegates should be deemed lawyers and which should not. For purposes of the numbers used in this paper, any delegates who

eventually sat on the Indiana Supreme Court. In addition, there were twelve others at the convention who sat as judges on lower state courts. The list of attorneys who had distinguished themselves, or would do so in the future, is substantial. It includes a U.S. Vice-President, Thomas Hendricks; two U.S. Senators, Hendricks and John Pettit; two Indiana governors, Hendricks and Alvin P. Hovey; an Indiana Lieutenant Governor, Samuel Hall; a U.S. Judge Advocate General, William McKee Dunn; an Indiana Supreme Court reporter, Horace Carter; two ministers to foreign countries, Hovey and James Borden; a Civil War General, Hovey; and finally, a number of U.S. Congressmen and members of the Indiana General Assembly.³ Despite the prominent legal leadership at the convention, a non-attorney, George W. Carr from Lawrence County, was elected president.

Twenty-four standing committees were formed at the convention, and of these, attorneys sat on nineteen. Lawyers were heavily represented on five of these committees: Finance and Taxation (70% lawyers); Miscellaneous Provisions (80% lawyers); and Revision, Arrangement and Phraseology (52% lawyers); as well as, not surprisingly, Organization of the Courts (92% lawyers); and Matters Pertaining to the Criminal Law (86% lawyers). Unfortunately, it is virtually impossible to get a clear picture of what contributions individual attorneys made on these committees, because no records of the committee proceedings have apparently been preserved. Three committees included no attorney members: State Officers Other than Executive and Judiciary; Future Amendments to the Constitution; and Accounts.

Interestingly, the Future Amendments Committee substantially departed from Indiana's original 1816 Constitution as to the method for making changes in the constitution. The former constitution had provided for the state's electorate to vote every twelve years on the question of holding a new constitutional convention. Through this system there existed an invitation to the people to reconsider the constitution regularly. The 1851 Constitution, in contrast, replaced the periodic convention referendum concept with that of making changes by amendment through a rather rigorous and difficult process, which was not very conducive to the adoption of amendments.

In terms of the quantity of resolutions proposed, attorney delegates did not outproduce the other delegates. Of the fifty-six attorney delegates, twenty-one

practiced law, were judges at any point during their lifetimes, or studied law (but never practiced) are considered lawyers. *See generally* 1 A BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1899 (Rebecca A. Shepherd et al. eds., 1980) (available in the William H. English Collection in the William Henry Smith Memorial Library, Indiana Historical Society). Numbers somewhat, though not inherently, conflicting were presented by William W. Thornton in a speech given to the State Bar Association in 1902. Mr. Thornton stated that "[t]he delegates consisted of 62 farmers, 39 lawyers, 16 physicians, 11 merchants and traders, 2 teachers, 2 manufacturers, 2 surveyors, 1 tanner, 1 carpenter, 1 millwright, 1 county recorder, 1 accountant, 1 miller, 1 baker, 1 editor" and seven men whose trades were unknown. *See* Thornton, *supra* note 1, at 176.

3. Thornton, *supra* note 1, at 176.

of them did not introduce any substantive resolutions. The other thirty-five introduced 118 resolutions. Altogether, the attorney delegates, comprising 36% of the total convention delegation, provided 36% of the total number of resolutions introduced.

However, the attorney delegates at the convention made significant contributions to certain areas of debate, including women's rights, African-American suffrage and citizenship, proposed abolition of the death penalty, special legislation, equal privileges, and the organization of the courts.

Although Professor Daniel Read of Monroe County was the delegate who introduced our Privileges and Immunities Clause, a number of attorneys contributed to the discourse on this topic.⁴ During these debates, Alvin Hovey moved to amend the proposed provision to offer an even broader set of protections than those eventually adopted. Many attorneys, including Hovey, Thomas Smith, Horace Biddle, John Niles, and Samuel Hall, contributed to the debate on this subject.

The organization of Indiana's courts, as would be expected, was another area of debate to which attorneys contributed significantly. Samuel Hall introduced a resolution that called for the abolition of the distinction between courts of law and courts of equity. This provision, along with those submitted by James Borden, Joseph Robinson, Hiram Allen, and Elias Terry, provided the foundation for Indiana's judicial system for the next 120 years. These provisions laid out the structure of the court system, the elections of prosecuting attorneys and attorneys general, and the groundwork for Indiana's pleading and practice. These reforms likely could not have been effectuated by a delegation that lacked members of the legal community. An interesting feud developed between two prominent attorneys—in fact, two future Indiana Supreme Court judges—on the question of whether Indiana should continue to use grand juries. Horace Biddle led the argument in favor of retaining the prevailing grand jury system, and John Pettit led the argument in favor of dismantling it. This debate encompassed a discussion of the purpose of a grand jury and whether any benefits provided by the system justified its cost. The discourse eventually culminated in article VII, section 17 of the constitution, which grants the general assembly the power to modify or abolish the grand jury system.

Daniel Kelso, another attorney delegate, submitted a resolution to abolish the death penalty. Although his proposal was tabled and failed to become part of the Indiana Constitution, it demonstrated Kelso's willingness to venture into new territory, even against prevailing sentiment. This tendency is exhibited in some of the comments he made on other subjects as well, such as the rights of women to own property.

Despite the significant contingent of lawyers at the convention, some of the constitutional provisions adopted actually targeted legal professionals themselves. The first of these, the original article VII, section 6, was aimed, curiously, at a specific judge then sitting on the Indiana Supreme Court. This section, no longer

4. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1393 (1850) [hereinafter REPORT].

in effect today, required the legislature to provide for the speedy publication of the supreme court's opinions and prohibited judges from publishing these opinions themselves. This provision, introduced by future Supreme Court Judge Alvin Hovey, is believed to have been placed in the 1851 Constitution because of the popular sentiment that Supreme Court Judge Isaac Blackford, who had been publishing the Court's opinions, had been neglecting his judicial duties in order to devote time to publication activities and had been profiting excessively from that venture.⁵

Another provision no longer on the books, article VII, section 21, arguably resulted from a backlash against privileged classes generally and lawyers in particular. This section guaranteed any voter "of good moral character" the right to practice law. It was not until early in this century that this provision was repealed, thereby making possible the development of law schools and bar examinations.

The stances taken by various attorneys on opposite sides of some divisive issues are observable in the context of the debate on African-American suffrage and citizenship. Attorney Beattie McClelland made a motion to remove the voting restrictions on Blacks and those of mixed race, but the motion was rejected by the convention at large. Other attorneys, including John Beard, Erastus Bascom, James Borden, and Henry Thornton, introduced similar provisions designed to grant Blacks voting and property rights. However, all of these provisions were also soundly defeated, and a greater number of attorney delegates—including Alvin Hovey—were among the opponents of these measures rather than among their supporters.⁶

Although difficult to discern from the document that eventually passed, the status of Indiana women was a much-talked-about topic at the 1850-1851 Convention. Debated vigorously and at great length were resolutions attempting to give women certain limited rights—particularly Robert Dale Owen's resolution attempting to give married women property rights separate from their husbands'. Owen, by far the most vocal advocate of women's rights, was not a lawyer. But several other women's rights resolutions were offered by lawyers, including one by Judge Borden, of Allen County, which was not much different from Owen's resolution, and was actually submitted before Owen first proposed his resolution.

5. LOGAN ESAREY, *HISTORY OF INDIANA FROM ITS EXPLORATION TO 1850*, at 457 n.18 (1970).

6. The views of these attorney delegates appear to have been representative of those of the population of Indiana at that time. On August 4, 1851, there were 109,319 votes cast on the issue of whether to adopt the constitution. Of this number, 82,564, or 76%, voted in favor of its adoption. Taken contemporaneously with the vote on the adoption of the constitution was a separate vote on a proposed constitutional provision for the exclusion and colonization of "Negroes and Mulattoes." That provision passed with an 81% majority vote (88,910 out of 109,967). The original Article XIII was found by the Indiana Supreme Court to be repugnant to the Article IV Privileges and Immunities Clause of the U.S. Constitution and to federal legislation passed thereunder, in the case of *Smith v. Moody*, 26 Ind. 299 (1866), and was repealed by amendment in 1881.

Attorney Daniel Kelso succeeded in improving the Owen resolution by expanding it to cover all married women; the original proposal covered only “women hereafter married in this state.” On Kelso’s motion, the word “hereafter” was struck from Owen’s proposal.⁷ William Steele—who, though not a practitioner, had studied law—sought the inclusion in the constitution of a requirement that the legislature provide by law “the right of petition to all white females of the age of eighteen and upward . . . for such laws as will tend to protect their best interest and that of their posterity.”⁸

The voices of attorneys also significantly contributed to what might be called a middle viewpoint in the discourse. Many indicated concern for protecting family harmony and feared that granting general property rights to married women would be inconsistent with that goal. However, several wanted to confer rights upon widows, who they felt were being treated unfairly by the current system. Those who spoke on this question referred to the estate laws of the time and the injustices they had seen the laws of descent work upon married women who had lost their husbands.⁹ Eighty percent of the delegates who took these middle-ground stances were lawyers.

Ultimately, the women’s property reform provisions were not adopted. The original votes on married women’s property rights were seventy-five yeas and fifty-five nays, with thirty lawyers voting against the reforms and sixteen voting in favor of them.¹⁰ The legal professionals, as a group, were neither more conservative nor more liberal on this subject than the convention’s overall membership.

Many today may find it interesting that an attempt to use the constitution to wipe out Indiana University altogether was made by one of the attorney delegates. Judge James W. Borden, a delegate from Allen County, made a proposal at the convention to abandon the University.¹¹ He also proposed that the income from Indiana University’s land endowment fund be distributed among the colleges of Indiana in proportion to the number of students attending them.¹² This proposal became the object of violent attack during the proceedings of the convention and was never passed.¹³

The main defender of the University, Daniel Read of Monroe County, was an educator and not a lawyer. However, some of his most important supporters

7. 1851 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 102 (Indianapolis, A.H. Brown 1851) [hereinafter JOURNAL].

8. *Id.* at 48.

9. The fact that the provision covered property acquired by “purchase” was considered problematic in the eyes of some, largely attorneys, who thought the provision acceptable with regard to otherwise acquired property but argued against changing the common law by giving married women the right of purchase. *See, e.g.*, 2 REPORT, *supra* note 4, at 1154-55 (remarks of Holman), 1156 (remarks of Hovey), 1162 (remarks of Bascom).

10. 2 *id.* at 1195-96.

11. 1 JAMES A. WOODBURN, HISTORY OF INDIANA UNIVERSITY, 1820-1902, at 194 (1940).

12. 1 *id.* at 123, 194; JOURNAL, *supra* note 7, at 734.

13. 1 WOODBURN, *supra* note 11, at 194.

on this topic were lawyers. For instance, his friend John Pettit (of Tippecanoe County), one of the three men who later sat on Indiana's Supreme Court, offered a resolution in defense of the University at Daniel Read's request: "All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." This language found its way into the final Constitution as article VII, section 7 (the education article).

Possibly the most important business at the convention—at least in the minds of many of the state's citizens and delegates—was the reformation of the legislative branch of Indiana's government. In a message he delivered on December 2, 1845, calling for the constitutional convention, Governor Whitcomb said:

The vast and growing amount of our special legislation, is a subject well calculated to arrest attention. Much the greater part of the legislature is occupied in passing local and private acts, for most of which, it is well worthy of consideration whether ample provision can not be made by a few general laws.¹⁴

Several provisions were introduced to correct the problems present in the legislature. One attorney delegate, Samuel Hall, introduced three such provisions. The first prohibited special legislation, restricting legislative acts from embracing more than one subject, and required that the subject of every act be expressed in its title. Hall also introduced a proposal to restrict the legislature from granting divorces, which was incorporated into article IV, section 22 (the section prohibiting certain types of special laws). The third provision Hall submitted was a proposal to require biennial sessions of the legislature, based on a presumption that the legislature would be able to conclude all its general, legitimate business by meeting every two years and that more frequent legislative sessions would result in undesirable special legislation.

The delegates' concern with the problems of special legislation was demonstrated by the fact that eleven other proposed sections were introduced on this issue. Five of the resolutions would have required the legislature to hold sessions only biennially, or even triennially. The other six proposals would either have prohibited special laws or required general laws. The convention eventually accepted and inserted into the constitution a provision submitted by attorney Beattie McClelland, in the form of article IV, section 23, requiring general laws where possible, and a provision introduced by attorney John Newman, in the form of article IV, section 22, prohibiting local or special laws on certain enumerated subjects. The delegates also voted favorably upon provisions compelling biennial sessions of the legislature, requiring single-subject laws, and mandating that the subject-matter content of bills be noted in their title.

Another lawyer, Thomas Smith, introduced a provision entitled "Revision or Amendments of Acts," dictating that no law be amended or revised by referring to its title and that any changes to a law must be made by publishing the entire section to be changed. This concept also found its way into the constitution

14. Thornton, *supra* note 1, at 155.

eventually adopted.

Although many of the details of the construction of the constitution are unknown due to a lack of committee meeting records, insight into the delegates' intent can be found in the published judicial opinions that were subsequently written by those delegates who became appellate judges. Because the court of appeals had not yet been formed, the only published Indiana opinions from the decades following the convention are those of the Indiana Supreme Court.

There were three delegates to the 1850-1851 Convention who later served as judges on the Indiana Supreme Court: Horace Biddle (1875-1881), Alvin Hovey (1854-1855), and John Pettit (1871-1877). The judicial opinions of these men would seem to be potential sources of unique insight into the intent of the constitution's framers; however, these three judges wrote on matters of constitutional law less frequently than might be imagined. Their presence at the convention does not appear to have given them any priority over the other judges with whom each served when it came to authoring opinions on Indiana constitutional issues. They did not write any more than their fair share of such cases. Moreover, when they did have opportunities to write on state constitutional issues, their opinions rarely implied any personal knowledge of the intentions or mental processes of the delegates.

Judge Alvin Hovey was the first of the three to serve on the Indiana Supreme Court. He was appointed by the governor on May 8, 1854—just three years after the convention ended. He served for an extraordinarily short period of time, slightly over one year, because he was defeated by Samuel Gookins in an election held in October of 1855.¹⁵ During this time, however, Judge Hovey authored several opinions that seem to incorporate his convention experiences or, at least, to reflect his constitutional values.

*Falkenburgh v. Jones*¹⁶ established the right of a defendant in forma pauperis to receive, free of charge, a trial transcript from the clerk of the court. In his discussion of article I, section 12, Judge Hovey wrote that statutes must be construed liberally in favor of the poor so that poverty is not made equivalent to a crime and so that innocent people are not convicted. Otherwise, the "part of the constitution providing that 'justice shall be administered freely and without purchase, completely and without denial' would be an empty boast, and worse than mockery to the poor."¹⁷ Another Hovey opinion more clearly suggests Judge Hovey's perspective as a convention insider. In *Langdon v. Applegate*,¹⁸ he construes article 4, section 21, which stated: "No act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length."¹⁹ Judge Hovey notes that the constitutional provision means what it plainly says, rather than the alternative interpretation urged: "the act as revised, or section as amended, shall be set forth

15. See 1 LEANDER J. MONKS, *COURTS AND LAWYERS OF INDIANA* 250 (1916).

16. 5 Ind. 296 (1854).

17. *Id.* at 299.

18. 5 Ind. 327 (1854).

19. IND. CONST. art. IV, § 21 (repealed 1960).

... ”²⁰ His opinion states:

A section so plain and clear would scarcely seem to need construction. *The convention, aware of the loose and imperfect manner in which bills were hurried through the general assembly, thought proper to throw several guards around the legislation of the state. Bills had been passed without being read; laws repealed by reference to the word, line, section or chapter; until the confusion that followed, left the statutes so imperfect and ambiguous, that the most able jurists in the state were unable to ascertain their meaning.*

To remedy these evils, the twenty-first section, with others, was adopted . . . ”²¹

For authority, he does not cite his personal knowledge of the framers’ intent but refers only to the published Convention Journal. Later in the opinion, however, and without citation to authority, he continues, “The delegates, aware by experience that great men are sometimes lazy, may have thought it advisable to remove every obstruction to a full understanding of bills when being enacted . . . ”²²

One case explicitly notes Judge Hovey’s opportunity to write from an enhanced perspective as a former convention delegate, but this observation is not found in one of Judge Hovey’s written opinions. In *Greencastle Township v. Black*,²³ the court invalidated a statute providing for township taxes to pay for schools “after the public funds shall have been expended.”²⁴ The decision discussed article VIII, section 1²⁵ and article IV, section 22.²⁶ Writing the majority opinion, Judge Hovey stated:

The object of both of these sections was to provide, not only that a ‘general system of education’ should be established, as was required by the constitution of 1816, but that such system should be both general and uniform; and for the purpose of more effectually securing that result, the 22d section places it beyond the power of the general assembly to pass local or special laws, ‘providing for supporting common schools.’²⁷

Judge Hovey reasoned that if this statute were found constitutional, the uniformity of the common school system would be destroyed.²⁸ Citing article X,

20. *Langdon*, 5 Ind. at 330

21. *Id.* (emphasis added).

22. *Id.* at 333.

23. 5 Ind. 557 (1855).

24. *Id.* at 562.

25. This section provides for “a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.” IND. CONST. art. VIII, § 1.

26. This section prohibits special and local laws on specific topics, including the support of common schools and preserving school funds. IND. CONST. art. IV, § 22.

27. *Greencastle Township*, 5 Ind. at 561 (emphasis added).

28. *Id.* at 564.

section 1 of the Constitution,²⁹ he stressed that the statute would lead to some townships assessing taxes, and others not, so that there would be no uniformity in either the amount of “time the school should be kept, or . . . the amount of the taxes to be paid” in the different townships.³⁰ With an implied reference to constitutional framers, Judge Hovey declared, “all the evils of the old system which *were intended* to be avoided by the new constitution—inequality in education, inequality of taxation, lack of uniformity in schools, and a shrinking from legislative responsibilities, would be the inevitable result,” and adds, “we will not bend the constitution to suit the law of the hour.”³¹

When this case went before the court on rehearing, Judge Hovey was no longer on the bench, and Judge Stuart, writing for the majority, observed, “Judge Hovey, who delivered the [first] opinion of the Court . . . being no longer on the bench, it is not improper to say that his position as a distinguished member of the constitutional convention, justly imparted great weight to his opinions on questions of constitutional construction.”³²

Delegate John Pettit became an Indiana Supreme Court judge twenty years after the convention ended. During the six years he served on the court, however, his opinions disclose little, if any, personal reflection upon his constitution-making experience. When construing provisions of the constitution, Pettit typically used language such as, “*Is it not reasonable to suppose that* [a provision] was framed and adopted in view of . . .,”³³ or, “*Is it not reasonable to suppose that . . . it was intended . . .*”³⁴

Judge Horace Biddle was the third Indiana Supreme Court judge who had formerly served as a delegate to the 1850 constitutional convention. His opinions, like those of Judge Pettit, contain very little express personal insight into the framers’ intentions. Rather, Judge Biddle’s discussions of the convention proceedings usually cite to the printed reports of the debates, much as a modern judge writing today might do. Thus, a reader of Pettit and Biddle opinions would find no indication that the authors of these opinions were actually present at, and participated in, the convention proceedings being discussed. For example, in *State v. Swift*,³⁵ after summarizing the convention’s debate reports on the topic of amending the constitution, Judge Biddle writes, “We may *thus ascertain the expressed intention of the framers* of the constitution”³⁶ In only one sentence of the opinion does Biddle speak with perhaps exceptional authority regarding the drafters’ intentions, and without attribution to authority.

29. This section provides for “a uniform and equal rate of property assessment and taxation.” IND. CONST. art. X, § 1.

30. *Greencastle Township*, 5 Ind. at 564-65.

31. *Id.* (emphasis added).

32. *Id.* at 566 (Stuart, J., on rehearing).

33. *Lucas v. Board of Comm’rs of Tippecanoe County*, 44 Ind. 524, 545 (1873) (Pettit, J., dissenting).

34. 2 REPORT, *supra* note 4, at 562.

35. 69 Ind. 505 (1880).

36. *Id.* at 514 (emphasis added).

Comparing the amendment ratification language of the constitution with its provision governing the numbers needed to elect certain state officers, Judge Biddle wrote, “This *difference in language* between the highest number of votes and a majority of all the votes *is not the mere accident of composition; the words are used advisedly.*”³⁷ Unfortunately, little other evidence of Judges Biddle, Hovey, and Pettit’s personal knowledge of the work or intentions of the framers is to be found in their opinions.

In retrospect, it may be fortunate that these judges did not attempt to exploit their roles as former delegates at the convention to engraft into judicial opinions their personal views of the “intentions of the framers.” The debates themselves show that John Pettit was a vocal opponent of incorporating into the constitution various proposed references to equality.³⁸ For his part, Alvin Hovey was outspoken on his belief that only white citizens should have the right to vote.³⁹ These views were not later reflected in their judicial opinions.

Despite their lack of official leadership roles and relatively unspectacular presence as a group at the 1850-51 Indiana Constitutional Convention, lawyers and judges did make important substantive contributions—some of which non-lawyers would have been unlikely to achieve. For instance, lawyers were influential in molding article I, section 13, concerning the rights of the accused. At times they were able to convince others of the consequences of writing a provision one way or another by sharing their knowledge of the law concerning the subject at hand. At one point before its final passage, the proposed article I, section 13 contained language “restricting the trial to the county in which the offense is committed.”⁴⁰ Robert Owen, a non-lawyer, wanted to remove these words, leaving it to the legislature to make the necessary provision for where trials took place, but James Rariden, a lawyer, pointed out that it is the right of the accused to be tried in the county where the offense was committed. Rariden noted that the courts had held that if the accused surrendered that right, then the state could exercise the power of removing the trial to another county.⁴¹ Future Indiana Supreme Court Judge John Pettit supported Rariden’s position and stated

37. *Id.* at 517 (emphasis added).

38. For instance, Pettit opposed retaining the 1816 constitution’s language stating that “all men are born equally free.” He argued repeatedly against this, stating that this “section in the old constitution is not true in fact, if true in theory. I do not believe it is true in theory. Men are not created equal. . . . Perhaps I should have employed the word ‘persons’ to make myself more clearly understood. Persons are not created equal.” 2 REPORT, *supra* note 5, at 1141. Pettit also moved to strike from the constitution the entire section providing, “All elections shall be free and equal.” *Id.* at 975. See also *id.* at 1378 (Pettit arguing that the purpose of proposed language concerning a defendant’s right to trial by a jury “of his peers” is to “prevent such an anomaly as a white man being tried by Negroes, for instance”).

39. Hovey personally submitted an amendment to a proposed universal suffrage provision that would have explicitly exempted “Negroes, mulattoes, and Indians” from its coverage. JOURNAL, *supra* note 7, at 121.

40. 2 REPORT, *supra* note 4, at 1379.

41. 2 *id.*

that he had drawn up an amendment similar to the one proposed, which authorized a change of venue in criminal prosecutions upon the application of the accused.⁴² The Pettit amendment was then voted upon and passed.⁴³

Lawyers also must be given credit for significant modifications to the double jeopardy provision. It was John Newman who moved to extend this provision's protections to cover any "person," rather than just men,⁴⁴ and it was attorney Walter March who suggested restricting the constitution's ban on compelled self-incrimination to criminal prosecutions only.⁴⁵

Although we may be inclined today to think of inefficiencies in the judicial system as a relatively recent phenomenon, the convention debates suggest otherwise. There seemed to be an impatience with the court system even 145 years ago. On this issue, the lawyers and judges serving as delegates provided important insight to the Convention. One example is found in the rather caustic remarks of Mr. Watts, an attorney, during the debate on the subject of debtors' prison:

[O]f late I have been constrained to think that I never again will resort to a court to obtain justice. The only good resulting from going to court is, that it puts an end to litigation, and I will tell you how. A man resorts to court for a redress of his rights, and through the medium of some technicality, he is thrown out of court, and has the privilege of going home and working harder than ever, to make up for his losses. This is what I call putting an effectual stop to litigation. I am in favor of courts for that reason, considering that there is a manifest impropriety in going into courts of justice, for the sake of obtaining justice.

I trust that some more effectual and speedy remedy will be provided for the punishment of the fraudulent debtor, than that of entering into a suit at law.⁴⁶

In view of the experiences which lead to such criticisms, it is not surprising that the constitutional convention was also an opportunity for improvement in the judicial system, initiated by those who were most familiar with its strengths and weaknesses. It was Hiram Allen, another attorney delegate, who submitted the resolution proposing:

that the Committee on the Practice of Law and Law Reform be requested to inquire into the expediency of so amending the constitution, that it shall require the legislature, at its first session after the adoption of the new constitution, to appoint three commissioners whose duty it shall be to revise, simplify, reform and abridge the rules and practice, pleadings and forms of proceedings of courts of record in this state, and report the

42. 2 *id.*

43. 2 *id.*

44. 2 *id.*

45. 2 *id.*

46. 1 *id.* at 352.

proceedings to the legislature for their adoption, modification or rejection.⁴⁷

This proposal, in large part, found its way into the final document and therefore ultimately resulted in the enactment of substantial improvements to the 1851 Constitution.

In conclusion, we discover that the Indiana lawyers and judges who served as constitution makers were not elite, privileged members of society, flaunting their knowledge and the expertise of their trade, dominating or controlling the proceedings, and imposing their values and objectives upon the convention. Rather, our professional forbearers seem to have participated as equal partners with the other delegates from all walks of Hoosier life in their grand quest for better government. While not providing the elected leadership at the convention, they were active delegates, serving as committee members, providing wisdom and insight when appropriate, proposing needed improvements, generally expressing their opinions with courtesy and respect, and facilitating compromise when the convention faced divisive issues. In numerous instances, the lawyers' speeches—even upon issues where passions and tempers appear to have been inflamed—were significantly more restrained, more courteous, and more conducive to peaceful resolution than the often more volatile rhetoric of some non-lawyer delegates. Rather than summaries of legal treatises and court opinions, the wisdom shared by the lawyer delegates often consisted simply of their knowledge of people and their general insight into life's experiences.

47. JOURNAL, *supra* note 7, at 71.